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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Applications of

MOONBEAM, INC.

GARY E. WILLSON

For a Construction Permit
New FM Station on Channel 265A
in Calistoga, California

TO: The Honorable Edward Luton
Administrative Law Judge

MM DOCKET NO. 93-42

File No. BPH-911115MG

File No. BPH-911115MO

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

**FINDINGS AND CONCLUSIONS OF GARY E. WILLSON
ON THE MOONBEAM, INC. FINANCIAL ISSUES**

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SUMMARY

Moonbeam has failed to meet its burden. Moonbeam was not financially qualified at the time it filed its application in November 1991 and Ms. Constant falsely certified the application. At that time, Moonbeam had two pending applications -- one for Eagle, Idaho, the other for Calistoga, California. Moonbeam had available, at most, \$153,000 to meet total estimated costs for both stations of over \$220,000.

Moonbeam also failed to demonstrate it was financially qualified at the time it filed a new financial certification on March 2, 1992. It failed to provide a financial statement for Mary Constant dated within 90 days of the new financial certification. Also, no new cost estimates were provided to account for a proposed new site.

Moonbeam has failed to demonstrate it has made reasonable efforts to calculate costs of constructing the Calistoga station. This is a prerequisite for establishing financial qualifications. Moonbeam has omitted, or failed to account for, key expenditures such as the construction of the main studio. It has also failed to adequately budget for legal fees and has failed to demonstrate how its large outstanding past obligation for legal fees and future legal fees will be paid.

Moonbeam has also failed to show it is currently financially qualified. It submitted a balance sheet for Mary Constant as of June 30, 1993, which overstated available assets and understated current liabilities. All of the balance statements submitted were grossly deficient. None even listed long-term liabilities. None detailed current liabilities or

assets. None of the financial statement were prepared by an accountant. None were even audited or unaudited. Moonbeam merely presented the self-serving evidence of Mary Constant, which Commission precedent has deemed insufficient to meet a burden on financial issues.

Moonbeam presented Alex Brown account statements which Mary Constant was not sure were complete and which cannot be used for the truth of the matter asserted therein. Ms. Constant claims that, as of the Friday before the hearing, \$90,000 was deposited in the Moonbeam checking account. No independent corroboration of this was offered. The amount is \$5,000 less than the anticipated costs of constructing and operating the station, and Moonbeam has made no showing demonstrating its ability to pay the large outstanding (over \$30,000) legal fees currently due in addition to legal fees which will be incurred in the future.

The record also demonstrates that Ms. Constant's testimony cannot be believed. She was oftentimes evasive and non-responsive (Tr. 356,367,378). More importantly, there were demonstrated instances of lack of candor and misrepresentations made. The June 30,1993 financial statement was knowingly inaccurate. She attempted to mislead the Commission about a half million dollar crop loan by indicating it would be paid off in less than a year when, in fact, this was not the case. She further claimed that legal fees were being paid on an ongoing basis when, in fact, less than half of Moonbeam's total legal fees have been paid to date.

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ON THE MOONBEAM, INC. FINANCIAL ISSUES**

I. FINDINGS OF FACT.**A. Background.**

By Memorandum Opinion & Order, FCC 93M-449 (released July 9, 1993), the following issues were added in this proceeding:

1. To determine whether Moonbeam, Inc. is financially qualified to construct and operate the proposed new FM station in Calistoga and, if not, the effect thereof on Moonbeam's basic qualifications to be a Commission permittee/licensee.
2. To determine whether Moonbeam, Inc.'s President, Mary Constant falsely certified that Moonbeam, Inc. was financially qualified in the initial application filed November 15, 1991, and/or again in an amendment filed March 2, 1992 and, if so, the effect thereof on Moonbeam's basic qualifications to be a Commission permittee/licensee.

The burden of proceeding with the introduction of evidence and the burden of proof on the added issues were placed on Moonbeam, Inc. (Moonbeam). See Order FCC 93M-623 (released September 29, 1993). Exhibits were exchanged on November 3, 1993. See Order

93M-651 (released October 14, 1993). A hearing on the added issues was held on November 15, 1993.

B. Financial Certification of the Application.

Mary F. Constant is the sole shareholder of Moonbeam, Inc. She prepared the Calistoga application with the help of her attorney and engineer (Tr. 287). The 301 application, signed November 12, 1991, estimated that \$95,000 would be necessary to construct and operate the station for three months. The identified source of funds was Mr. A. Langworth Manion, Alex Brown & Sons, 345 California Street, San Francisco, California 94101. His relationship was identified as a banker, and the amount available was \$100,000. Moonbeam Ex. G.

At hearing, Ms. Constant testified that she had a balance sheet (Moonbeam Ex. D) and cost documentation (Moonbeam Ex. F) on hand at the time she completed her application (Tr. 309). At deposition, she testified she had no detailed balance sheet within 90 days of the application but had only the two Alex Brown statements and her hand-written balance sheet (Tr. 359). She had nothing on hand at the time the application was signed showing net income after federal income taxes for the past two years for Moonbeam and no such information concerning income for herself other than W-2 forms which she does not recall if she reviewed (Tr. 360,361).

Ms. Constant testified that at the time she filed the application and amended it in March 1992, she was not relying on any of her own or Moonbeam's income to fund the construction, operation, and/or prosecution of the application (Tr. 393). When

asked how she intended to pay continuing legal fees, she testified that she would rely in part on income (Tr. 332). Ms. Constant has no employment other than as an actress or model from time to time (Tr. 354). She rented on occasion her former home for use in commercials and movie sets (Tr. 354). She testified at her deposition that she received no income for performing services or for any other employment (Tr. 355). She also testified at her deposition that she probably earned \$500 per month on average during the past year (Tr. 356,357). Ms. Constant has no other savings accounts and Moonbeam had no checking account in November 1991 (Tr. 354).

C. The March 1992 Amendment.

Moonbeam amended its application on March 2, 1992 to effect a number of changes. It amended its financial certification, proposed a new tower site, and provided an amended integration statement. At her deposition, Ms. Constant couldn't recall the purpose of the March 2, 1992 amendment. Even after reviewing the amendment, she did not believe that the engineering had been amended (Tr. 80). She didn't believe that a new tower site had been specified (Tr. 81). She didn't recall that her financial showing had been amended (Tr. 83).

The financial certification was amended to report that Mary F. Constant, Shoot the Moon, Nicasio, California 94946, was now the source of funds and would contribute up to \$100,000 toward estimated construction and operating costs of \$95,000. See Moonbeam Ex. I. Ms. Constant testified there was no change in the source of funds and that Alex Brown & Sons referenced in the

initial application, was merely a place where the funds were deposited (Tr. 319). She claims there was no change in her financial condition from November 12, 1991 until February 27, 1992 when she certified the March 2, 1992 amendment (Tr. 322,323).

D. Cost Estimates.

Ms. Constant prepared a hand-written budget within a couple of weeks of the time the application was completed (Tr. 291). Her hand-written budget provided for the following projected costs for the construction, operation and prosecution of the application:

I. Facilities

Transmission		
Antenna	\$1,700	
Transmission line, etc.	1,000	
Transmitter & rel.	8,000	
STL & monitoring	8,000	
Other	<u>2,000</u>	
		\$20,700

Studio

Automation	\$9,000	
Satellite	5,000	
Other	<u>4,000</u>	
		\$18,000
		2,000

Office

(furniture etc, on hand)

Total Facilities	<u>\$40,700</u>
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II. Estimated Start-Up

Technical

Rent	\$ 600	
Other	<u>300</u>	
Total		\$ 900

Programming

Personnel	1,500	
Programming	500	
Other	<u>100</u>	
Total		2,000

<u>Sales/Promo</u>		800
<u>General Administrative</u>		
Salaries	\$ 2,000	
Rent	600	
Telephone	100	
Ins.	200	
Other	<u>100</u>	
Total		\$ 3,000
Total Monthly Operating		\$ 6,800
3 mo.		20,400

III. Startup

No financing costs		
Legal fees and other	<u>\$33,900</u>	\$33,900

Recap

I. Facilities	\$40,700
II. Operations	20,400
III. Startup	<u>33,900</u>
	95,000

Ms. Constant was assisted by her attorney and engineer in preparing the budget (Tr. 290). She relied on her engineer Mr. Klein's budget. Moonbeam Ex. E. At her deposition, she claimed that her legal counsel only provided general advice about cost estimates (Tr. 364). She thinks she padded some of the figures a bit (Tr. 292). She discussed cost estimates with her husband, Fred Constant (Tr. 363). She did not recall at her deposition the meaning of the heading "G&A" referenced on her budget (Tr. 363).

Ms. Constant testified that she planned to construct a studio building in Calistoga (Tr. 133). She also testified there would be an auxiliary studio in Santa Rosa (Tr. 86). She testified earlier in deposition that the main studio would probably be located at KFTY in Santa Rosa, California (Tr. 85). The budget

anticipated three employees (Tr. 129). Ms. Constant did not provide in her budget for a full-time engineer (Tr. 132). She contemplates hiring a part-time engineer and a part-time secretary (Tr. 160). She claims she had money available to pay for part-time employees (Tr. 160,161).

She consulted with her attorney concerning attorney fees, including filings fees and other fees (Tr. 308). She budgeted estimated legal fees and other of \$33,000. However, total legal fees through October 1993 billing alone have been over \$60,000 (Tr. 378). Moonbeam claims it is paying legal fees on an ongoing basis. However, Ms. Constant has a current outstanding bill for legal services of over \$31,000 (Tr. 377). In fact, Moonbeam's legal fees have not been paid in full since November 1992 (Tr. 378).

Ms. Constant testified at hearing that she intends to pay Moonbeam's continuing legal fees from income and remaining funds in the Alex Brown account and from the amount budgeted for legal fees in her budget (Tr. 332). In Moonbeam's August 30, 1993 Response to Financial Documents requested by Willson, Moonbeam claimed that it never intended to rely on the income of Mary Constant for funds to construct the station and operate for three months, or to prosecute Moonbeam's application (Tr. 387). Ms. Constant claims this is a true statement (Tr. 388). Moonbeam also claimed in its Opposition to Motion to Compel filed September 21, 1993 that it had been handling its legal expenses on an ongoing basis (Tr. 382).

E. Balance Sheets.

Mary Constant prepared a personal balance sheet sometime just prior to completing the application (Tr. 296). The handwritten balance sheet shows the following:

Mary F. Constant
Balance Sheet for Calistoga Application
August 30, 1991

Liquid Assets

Cash & listed securities: in excess of \$170,000
Accounts receivable: not included

Current Liabilities

Bills, taxes, and all other: less than \$17,000

net available liquid assets	in excess
for construction, and for	of \$153,000
three months of operation	
and application processing:	

Ms. Constant has never prepared a financial statement with the exception of completing a financial statement for a loan to buy a house in Lake Oswego, Oregon before she was married and in conjunction with a business loan (Tr. 346,347). The balance sheet was prepared within three months of preparing the application (Tr. 343).

The Alex Brown statements (Moonbeam Exs. B and C) reflect the amount of money she believed was available to her at the time the balance statement was prepared (Tr. 298,299). She relied only on money available as reflected in the Alex Brown statements (Tr. 300). She did not rely on any other assets (Tr. 300). The August 30, 1991 Alex Brown statements were the most contemporaneous statements available at the time the balance sheet was prepared (Tr. 310).

Ms. Constant believes Alex Brown mailed statements on a quarterly basis unless there was activity in the account (Tr. 310). Activity in the account is reflected in the statement on a monthly basis. Transactions, including stock, are listed, but checks that have cleared the account are not (Tr. 301,302). The original Alex Brown statements were lost approximately a year ago (Tr. 342). Ms. Constant is not certain whether the Alex Brown account statements (Moonbeam Exs. B and C) are complete (Tr. 302-304).

Ms. Constant determined her current liabilities were less than \$17,000 based on all liabilities due in a one-year period. These included bills, taxes, and what would be left of the mortgage payment for that year after deducting income generated by her Nicasio residence (Tr. 297). Her house was leased for commercial and movie use in 1991 and generated an estimated \$40,000 (Tr. 297). At the time the balance sheet was prepared, Ms. Constant was an obligee on a \$500,000 deed of trust note payable over 30 years (Tr. 343). The interest rate on the note varied from 8 to 12 percent based on the prime (Tr. 344). Payments on the note were approximately \$44,000 per year.

As of November 12, 1991, she was not aware of owing any delinquent taxes (Tr. 316). A tax lien was later filed on December 8, 1992 in the amount of approximately \$15,000 (Tr. 317, 372). At her deposition and again at hearing, Ms. Constant testified that she was certain she was subject to no other liens (Tr. 373). It turns out, however, that a mechanics lien in the

amount of \$2,341 was recorded identifying Ms. Constant as the responsible party for the debt (Willson Ex. C).

Ms. Constant's most current balance statement is a June 30, 1993 balance sheet. Moonbeam Ex. M. Her liquid assets are funds in her Alex Brown accounts (Tr. 328). The balance statement did not reflect a \$546,000 liability which was incurred just that month (Tr. 348-349). Willson Ex. A. This obligation, a crop loan, which is a joint obligation with her husband, is payable in monthly payments of \$4,276. Ms. Constant believes the note is secured by her residence -- the vineyard (Tr. 350). The note refers to security by a personal property lien (Tr. 350). Ms. Constant is unsure what this means (Tr. 350).

Moonbeam submitted an account statement in the name of Mary F. Constant, Alex Brown for the period May 29 to June 25, 1993 showing the net value of Mary F. Constant's account at \$421,778.99. Moonbeam Ex. J. The account statement for the same account for the period covering June 26 to July 30, 1993 showed an account value of \$271,080.89. Moonbeam Ex. K. The account value dropped because funds were transferred to Fred Constant for his share of the profit on the sale of the Constants' Nicasio residence (Tr. 362). The Abbie and Bianco retirement fund for the period June 26 to July 30, 1993 showed a drastic drop in value to \$4,788.21. Moonbeam Ex. L.

Ms. Constant testified that Moonbeam has presently available "sufficient assets to build and run the radio station for three months" (Tr. 323). She claims there is more than \$95,000

available right now (Tr. 323). She later testified that she deposited \$90,000 into her Moonbeam account (Tr. 359).

F. The Eagle, Idaho Application.

Moonbeam filed an application on May 16, 1991 for an new FM station in Eagle, Idaho (Tr. 280). Moonbeam's Eagle, Idaho application projected total costs to construct and operate the station of \$125,000. The source of funds was identified as Mr. Lang Manion, Alex Brown & Sons (Tr. 282). Ms. Constant contemplated utilizing the same source of funds from her Alex Brown accounts for both the Eagle, Idaho and Calistoga, California applications (Tr. 286,365).

The four competing applicants for the Eagle, Idaho facility filed a Joint Request for Approval of Settlement Agreement on July 31, 1991. The Settlement Agreement provided for the dismissal of the Moonbeam application and two other applications, and grant of the Eagle Broadcasting, Inc. application. However, dismissal of the Moonbeam application was contingent on approval of the Joint Request for Approval of Settlement Agreement (Tr. 398). The Commission did not approve the Settlement Agreement until January 24, 1992, two months after Moonbeam filed its application for Calistoga, California (Tr. 366,398). Ms. Constant never amended the Moonbeam application for the Eagle, Idaho facility at any time subsequent to the date the Joint Request for Approval Settlement Agreement was filed (Tr. 370). She never advised the Commission in either the Calistoga, California or Eagle, Idaho proceeding that she was no longer interested in prosecuting the Eagle, Idaho application or that

she lacked the funds to prosecute both the Eagle, Idaho and Calistoga applications (Tr. 370,400).

II. CONCLUSIONS OF LAW.

A. Standard for Financial Certification.

In its Revision of Application for Construction Permit For Commercial Broadcast Station (FCC Form 301), 4 FCC Rcd. 3853, 3859 (1989)(Revision Order), the Commission reaffirmed that the underlying standards for financial qualifications remained unchanged but required applicants to report their estimate of the total funds necessary to meet construction, prosecution, and initial operating costs, and to specify the source of such funds. The Commission noted, "We stress that when the applicant checks the box on Form 301 that it is financially qualified, it must have at that time ... sufficient funds available from committed sources to construct and operate the facility." Id.

The instructions to the Revised Financial Qualifications section of FCC Form 301 in pertinent part require an applicant to have:

Section III-D,

- [3] (b) For each person identified in response to Question 3, Section III, who has **already** furnished funds, purchased stock, extended credit, or guaranteed loans:

A copy of the agreement obligating the party to furnish funds, showing the amount furnished, the rate of interest, the terms of repayment, and security, if any.

- (c) For each person identified in response to Question 3, Section III, who has **agreed** to furnish funds, purchase stock, extend credit, or guarantee loans, a balance sheet or a financial statement showing:

All liabilities and current and liquid assets sufficient to meet current liabilities;

Financial ability to comply with the terms of the agreement to furnish funds, purchase stock extend credit, or guarantee loans; and

Net income after Federal income tax, received for the past two years.

In order to meet its burden on financial issues, an applicant must demonstrate:

In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of funds to meet these estimated expenses, the applicant must provide substantial and reliable evidence showing "sufficient net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue"

Northhampton Media Associates, 4 FCC Rcd. 5517, 5519 (1989),
aff'd on other grounds, 941 F2d 1214 (D.C. Cir. 1991).

B. The August 31, 1991 Balance Sheet.

Moonbeam relies on the balance sheet of Mary F. Constant to demonstrate that Ms. Constant has available net liquid assets in excess of liabilities to meet projected expenses of \$95,000. The balance sheet is woefully inadequate. It does not itemize current assets or liabilities and, for that matter, omits significant current liabilities. It does not even list long-term liabilities. It fails to itemize liquid assets. It is not prepared in accordance with standard accounting procedures. Moonbeam has failed to provide an audited or even an unaudited financial statement for the period prior to the time the

application was certified on November 12, 1991 or at any time subsequent. (Findings p. 7).¹

The burden of proof is on Moonbeam to affirmatively demonstrate that it had available liquid assets on hand to construct and operate the station. Moonbeam relies solely on a the self-serving testimony of Mary F. Constant. Her testimony is not corroborated in any way and is therefore insufficient to meet her burden. Alex Brown account statements were provided for a period three months prior to the time the application was filed, but Ms. Constant was unable even to affirmatively attest that the statements were complete. The statements were not offered for proof that the funds were in fact on deposit, but only for the proposition that Ms. Constant believed they were (Tr. 304). Moonbeam must demonstrate it had the funds, not merely that it believed it had the funds. (Findings p. 7.)

In Central Florida Communications Group, 8 FCC Rcd. 4128 (released June 18, 1993), the Review Board affirmed the ALJ's disallowance of a financial statement. The Board noted:

The ALJ culminated his analysis of the financial statement by rejecting its reliability, averting to a disclaimer by the accountant that the latter "had not audited or reviewed the accompanying statements of financial condition," that the Cherrys' have elected to omit substantially all of the disclosures required by generally accepted accounting principles" and that if those matters were included "they might influence the user's conclusions about the financial condition of Charles W. and Julia Cherry.

¹ References are made to the transcript or other evidence only if such evidence is not set forth in Findings. Otherwise, all citations are to Findings.

Id. at ¶5. In Central Florida, the financial statement was at least prepared by an accountant. Here, not only is the financial statement prepared by Mary Constant and thus self-serving as noted, but it is woefully deficient on its face. As noted by the Review Board in Central Florida, "It was incumbent on the applicant to set forth clearly its finances to meet its burden of proof on the issue." Id. at ¶10. See also, Aspen FM, Inc., 6 FCC Rcd. 1603 (1991) ("Reliance on the self-serving statement of the individual responsible for the certification that he took the appropriate steps to secure the needed funds will not be sufficient"); Northhampton Media Associates, 4 FCC Rcd. 5517, 5519 (1989) ("probative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds").

The balance sheet also neglected to include a \$125,000 current liability. Ms. Constant claimed less than \$17,000 in current liabilities. Ms. Constant omitted as a current liability her pending application for a new station in Eagle, Idaho. Commission precedent is unmistakably clear that an applicant must have reasonable assurance of funds to construct and operate all pending applications. See Welch Communications, Inc., 7 FCC Rcd. 4542, 4547 (1992) ("moreover, where an applicant (such as Swan here) has more than one application pending before the Commission, it must demonstrate adequate resources to construct and operate all proposed facilities"); Isis Broadcasting Group, 7 FCC Rcd. 5125 at n. 38 (Rev. Bd. 1992) (a balance sheet must reflect

all financial obligations to other stations); Breeze Broadcasting Company, L.P., 8 FCC Rcd. 1835, 1837 (Rev. Bd. 1993)(an applicant must demonstrate the available funds to simultaneously construct 72 LPTV's, 46 MDS and 30 cellular applications, plus an FM proposal, despite the fact that there was a near certainty most would not be granted). See also, Playa del Sol Broadcasters, 8 FCC Rcd. 7027 (Rev. Bd. 1993). Ms. Constant's balance sheet showed net available liquid assets of only \$153,000. She was relying on this money to meet \$125,000 of projected costs associated with the Eagle, Idaho station and \$95,000 of projected costs for the Calistoga station. She clearly had insufficient funds at the time she certified her Calistoga application to meet projected costs for both stations. (Findings p. 10.)

Moonbeam will undoubtedly claim that, at the time the Calistoga application was filed, a settlement agreement was pending in the Eagle, Idaho proceeding. However, the Eagle, Idaho application was to be dismissed only if the Settlement Agreement was approved. The Settlement Agreement was not approved until January 24, 1992. Until that time, the Eagle and Calistoga applications were both pending.² See Texas Communications Limited Partnership, 5 FCC Rcd. 5876, 5878 (Rev. Bd. 1990)("Also,

² Ms. Constant testified that she was advised by counsel at the time the application was filed that the settlement agreement would be approved. However, by letter dated November 13, 1991, just days before the Calistoga application was filed, Larry Eads, Chief of the Audio Services Division of the FCC, advised the parties not to expect any action from the Commission on the settlement until the end of December. The letter in no way implied or stated that the Settlement Agreement would be granted. In fact, the letter indicated that legal review of the settlement documents had not even been completed yet. See Addendum 1.

where as here, an applicant files multiple applications, it must be able to demonstrate that it is financially qualified as to all pending applications")(emphasis added). At no time did Moonbeam amend either application to report that it was financially qualified to construct and operate only one of the stations. See Welch Communications, Inc., supra at ¶27 ("While it may be argued that Swan was financially qualified to construct and operate its proposed Swan facility at the time it filed its application, once Swan filed for Lima, it had a clear obligation to report to the Commission that it was not financially qualified to construct and operate both proposed stations at Swan and Lima (pursuant to 47 C.F.R. §1.65)"). If Moonbeam had amended either application, it would have risked dismissal of one or possibly both the applications. (Findings p. 10.)

C. Cost Estimates.

In order to meet its burden of proof that it is financially qualified, an applicant must first demonstrate it has made reasonable efforts to ascertain the cost of constructing, operating and prosecuting its application. See Northhampton Media Associates, 4 FCC Rcd. 5517, 5519 (1989)("In order to prove reasonable assurance of financial qualification at the time of certification, the applicant must produce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs"). Moonbeam has failed to meet its burden. Record evidence indicates that its cost estimates do not reflect the reasonable costs of operating, constructing and prosecuting the

Calistoga application. As such, Moonbeam has failed to demonstrate it has sufficient funds because it has failed to specify reasonable costs of constructing, operating and prosecuting its application.

Ms. Constant calculated her costs after consulting with her engineer, Mr. Klein, and her FCC counsel. Ms. Constant's cost estimates for her operational and construction costs are the same as the costs calculated by Mr. Klein. She claims she "padded" her cost estimates to provide a cushion over the figures provided by Mr. Klein, but it appears that she did not (Tr. 292). Compare Moonbeam Ex. F and Moonbeam Ex. E. Ms. Constant only added \$33,900 to the costs provided by Mr. Klein for "projected legal expenses and other." (Findings pp. 5,6.)

Testimony at hearing, as well as the cost documentation provided, reveals significant and material deficiencies in Ms. Constant's projected costs. Ms. Constant testified that she intended to construct a main studio in Calistoga. There is no provision for the significant cost associated with the construction of a studio facility. Ms. Constant also indicated she intended to operate an auxiliary studio in Santa Rosa. There is likewise no allocation for an auxiliary studio. Ms. Constant testified she intended to employ three full-time personnel and that she also intended to hire a part-time engineer, and possibly other part-time personnel. However, Mr. Klein's construction and operating budget on which Ms. Constant based her cost estimates only provides for two full-time personnel and one part-time employee, or three part-time personnel and one full time

employee. Moonbeam Ex. E. No provision was made for the cost of an engineer. (Findings pp. 5,6.)

The most troubling aspect of the cost estimates is the inadequacy of the amount budgeted for legal fees and questions whether Moonbeam can pay those fees and have sufficient funds to construct and operate the station. Although representing it had been paying legal fees on an ongoing basis, it turns out Moonbeam is currently in arrears of over \$30,000 for legal fees as of October 1993. Moonbeam has not been current on payment of legal fees since November 1992. Total legal fees as of October 1993 were in excess of \$60,000. It is evident that Moonbeam's projected costs for legal and other services of \$32,900 is woefully inadequate. (Findings p. 6.)

Since Moonbeam has not been paying legal fees on a current basis, it must demonstrate it has reasonably calculated those projected expenses and has the wherewithal to pay those fees. It has not. The Court of Appeals recently noted in Weyburn Broadcasting Limited Partnership v. FCC, 71 RR2d 1386, 1392 (D.C. Cir. 1993), that an applicant, by demonstrated "independent evidence," must have "reasonable and reliable evidence of its financial ability to meet its share of prosecution expenses." The Court determined that consistent and substantial payments for prosecution expenses by an applicant was not on the same footing as payment of such expenses on a current basis. Id. at 1391.

D. B-Cutoff Amendment.

The added financial issue also explores whether Moonbeam falsely certified its financial qualifications in its March 2,

1992 amendment. Moonbeam submits no evidence on this issue except for the self-serving testimony of Mary Constant who claims there was no change in the financial plan. No new cost estimates were submitted. Nor was a new financial statement.

Moonbeam, among other things in its amendment, provided new engineering. It proposed a new site controlled by KFTY and abandoned its early-proposed site controlled by Diablo Communications. Contrary to Ms. Constant's testimony, there was a significant change in Moonbeam's plan -- a new site. Moonbeam, however, has provided no cost documentation reflecting this change. Indeed, according to Mr. Klein's cost estimates, used by Ms. Constant, Moonbeam's estimates are based on use of the Diablo Communications site. Moonbeam Ex. E. Moonbeam has failed to meet its burden. It offered no evidence that it had reasonably calculated the costs of its proposed new transmitter site and failed to provide a balance sheet within three months of its new financial certification, filed on March 2, 1992. (Findings pp. 4-6.)

E. Current Financial Qualifications.

One of the added issues seeks to determine whether Moonbeam is currently financially qualified. There is no evidence that Moonbeam currently, as of the date of the hearing, has the requisite funds available to construct, operate and prosecute its application. Ms. Constant testified that she just recently deposited \$90,000 in the Moonbeam checking account. However, no corroborative evidence was offered other than Ms. Constant's self-serving testimony, and the amount deposited is less than the

\$95,000 projected costs. Furthermore, no evidence has been offered addressing any potential Moonbeam liabilities. Indeed, even if the \$90,000 allegedly deposited in Moonbeam's checking account is credited, it has current liabilities of over \$32,000 in legal fees as of the end of October 1993. This does not include additional legal fees for the hearing in November and for other ongoing legal services such as preparation of Findings and Conclusions. Ms. Constant described the money deposited in the Moonbeam account as "sufficient assets to build and run the radio station for three months" (Tr. 323). There is no mention of funds sufficient to meet the very significant outstanding legal fees. (Findings pp. 9,10.)

The most recent balance sheet submitted by Ms. Constant is her balance sheet as of June 30, 1993. This balance sheet suffers from the same infirmities as her earlier balance sheet dated August 21, 1991 -- it does not identify current assets or liabilities and it does not even list long-term liabilities. It is not prepared by an accountant and is nothing more than a self-serving statement of Mary Constant unsupported by any corroborating evidence. (Findings p. 9.)

Mary Constant did provide the account statements from Alex Brown for the period May 29 to June 25, 1993 showing total assets of \$421,778.99 and the Alex Brown statement for the same account for the period June 26 to July 30, 1993 showing an account value of \$271,080.89. Also provided is the account statement from Alex Brown for the Abbie & Bianco retirement account showing a net value in the account of \$4,788.21. Even taking the Alex

Brown statements at face value, Ms. Constant did not have in excess of \$400,000 available as claimed, but she had less than \$275,000 based on the account statement for the relevant period. Indeed, after asserting throughout that the money in the Alex Brown accounts is hers, it turns out that the drastic drop in the account value between the June and July Alex Brown statements was due to a pay-out from the account to Fred Constant for his share of the proceeds on the sale of the Constants' Nicasio residence. (Findings p. 9.)

The current liabilities have also been misstated. Ms. Constant claims that there are a total of less than \$20,000 worth of current liabilities. Ms. Constant, however, neglected to factor in a major liability which was incurred only weeks before the June 30, 1993 balance sheet. Fred and Mary Constant obtained a business loan (crop loan) for \$546,100 repayable in monthly installments of \$4,276.63 amortized over 30 years at 7.13 percent. Obligations on this debt alone during just a one-year period represents \$51,319 in short-term liabilities. This is not included on the financial statement, nor is the loan even identified. (Findings p. 9.)

Furthermore, there is significant tax liability which has been unaccounted for in Ms. Constant's June 30, 1993 balance sheet. The Constants sold their Nicasio home in 1993 and purchased their Calistoga residence shortly thereafter (Tr. 352, 353). Ms. Constant admitted that she made a capital gain on the sale of the house but claims any tax liability is not due for another three years (Tr. 353). Where a capital gain is made on